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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/807,972	03/24/2004	Tomasz Ondrusz	006422.00006	4460

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GABLE & GOTWALS
100 WEST FIFTH STREET, 10TH FLOOR
TULSA, OK 74103

EXAMINER	
FRISBY, KESHA	
ART UNIT	PAPER NUMBER
3714	
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07/08/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/807,972	ONDRUSZ ET AL.	
	Examiner	Art Unit	
	KESHA FRISBY	3714	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *10 April 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *45-55* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *45-55* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Status of Claims

After the response was filed on 4/10/2008, claims 45-55 are pending and claims 1-44 have been withdrawn.

Priority

1. Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

3. Claim 45-49, 51, 52, 54 & 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gordon et al. (U.S. Publication Number 2003/0027688) in view of Petrus (U.S. Patent Number 7.136.820).

Referring to claims 45 & 54, Gordon et al. discloses first computer means for processing data (computer 110); wherein: each sports person using the system inputs a selection of a sport (paragraph 0016) and, in response to enquiries generated by the first computer means, information concerning his/her physiological profile (paragraph 0015); and from this comparison formulates a training regime which is relayed to the sports person (generating a customized exercise program). *Gordon et al. does not disclose which has a database which stores for each of a plurality of sports a record of an*

idealized physiological profile and the first computer means compares the physiological profile input by each sports person with the idealized physiological profile for the relevant sport. Gordon et al. does disclose a database for storing measurements and setting up a profile for each user (paragraph 0013), can be related to a sport person (abstract) and a customized exercise program may include a nutrition program portion (paragraph 0080). However, Petrus teaches having a database which stores for each of a plurality of health profiles a record of an idealized physiological profile (a health profile for a person of the consumer's age and health history background) and compares the physiological profile input by each person with the idealized physiological profile (abstract). It would have been obvious to one of ordinary skill in the art at the time the invention was made to include storing ideal health profiles and having the ability to compare a person's health information to an ideal health profile, as disclosed by Petrus, incorporated into Gordon et al. so that an individual will be able to determine their nutritional needs in comparison to an ideal healthy person/profile. Basically, the individual is able to determine the nutritional needs needed to become more like the ideal healthy person/profile.

Referring to claim 46, Gordon et al., as modified by Petrus, discloses wherein: the first computer is connected via a telecommunications network to a plurality of remotely located computer means (Fig. 1 & the associated text of Gordon et al.); and each sports person uses one of the plurality of remotely located computer means to input data to the first computer means via the telecommunications network (paragraph 0013 of Gordon et al.) and to receive enquiries (computer 110 of Gordon et al.) and the formulated training

regime from the first computer means via the telecommunications network (computer 110 & generated customized exercise program of Gordon et al.).

Referring to claim 47, Gordon et al., as modified by Petrus, discloses wherein: the first computer means for each sports person scales the stored idealized physiological profile for the selected sport having regard to the weight of the sports person and compares the input physiological profile with the scaled identical physiological profile when formulating the training regime (paragraphs 0014 & 0080-0082 of Gordon et al.).

Referring to claim 48, Gordon et al. discloses wherein: the first computer means for each sports person scales the stored idealized physiological profile for the selected sport having regard to the gender of the sports person and compares the input physiological profile with the scaled idealized physiological profile when formulating the training regime (paragraph 0015 of Gordon et al.).

Referring to claim 49, Gordon et al., as modified by Petrus, discloses wherein: the first computer means for each sports person scales the stored idealized physiological profile for the selected sport having regard to the age of the sports person and compares the input physiological profile with the scaled idealized physiological profile when formulating the training regime (paragraph 0015 of Gordon et al.).

Referring to claim 51, Gordon et al., as modified by Petrus, discloses wherein: the training regime formulated by the first computer means comprises recommendations for training session frequency (paragraph 0019 of Gordon et al.).

Referring to claim 52, Gordon et al., as modified by Petrus, discloses wherein: the

training regime formulated by the first computer means comprises recommendations for heart rate during training (paragraph 0018 of Gordon et al.).

Referring to claim 53, Gordon et al., as modified by Petrus, discloses wherein: each sports person inputs periodically, in response to enquiries generated by the first computer means, data to establish a psychological profile for the sports person (paragraph 0015 of Gordon et al.); and the first computer means compares each input psychological profile for each sports person with a stored base psychological profile for the sports person (abstract of Petrus) and dependent on the comparison can modify the training regime formulated by the first computer means (paragraph 0019 of Gordon et al.).

Referring to claim 55, Gordon et al. discloses first computer means for processing data (computer 110); wherein each sports person using the system inputs, in response to enquiries generated by the first computer means, information concerning his/her physiological profile (paragraph 0015); each sports person using the system can vary the pre-programmed physiological profile by inputting a target or targets selected from options provided by the first computer means (paragraphs 0022-0050); and from this comparison formulates a training regime which is relayed to the sports person (generating a customized exercise program). *Gordon et al. does not disclose which has a database which stores a record of a pre-programmed physiological profile and the first computer means compares the physiological profile input by each sports person with the varied physiological profile selected by the sports person.* Gordon et al. does disclose a database for storing measurements and setting up a profile for each user

(paragraph 0013), can be related to a sport person (abstract) and a customized exercise program may include a nutrition program portion (paragraph 0080). However, Petrus teaches having a database which stores a record of an pre-programmed physiological profile (a health profile for a person of the consumer's age and health history background) and compares the physiological profile input by each person with the varied physiological profile selected by the individual (abstract). It would have been obvious to one of ordinary skill in the art at the time the invention was made to include storing ideal health profiles and having the ability to compare a person's health information to an ideal health profile, as disclosed by Petrus, incorporated into Gordon et al. so that an individual will be able to determine their nutritional needs in comparison to a pre-programmed healthy person/profile. Basically, the individual is able to determine the nutritional needs needed to become more like pre-programmed healthy person/profile.

4. Claim 50 is rejected under 35 U.S.C. 103(a) as being unpatentable over Gordon et al./Petrus and further in view of Blau et al. (U.S. Patent Number 6,176,241).

Referring to claim 50, Gordon et al. discloses a system as claimed in claim 45. *Gordon et al. does not wherein: each stored record o fan idealized physiological profile comprises measurements taken from the set of: maximum capacity to transport oxygen to tissues; percentage of maximum oxygen transport capacity that may be maintained without accumulation of lactate; greatest weight that can be lifted once; maximum power; maximum number of sit-ups performed without rest; maximum number of push-ups performed without rest; maximum number of crunches performed without rest; and*

local muscle endurance; and the first computer means generates enquiries relayed to the sports person which require data matching the measurements stored for the idealized physiological profile. However, Blau et al. teaches wherein: each stored record of an idealized physiological profile comprises measurements taken from the set of: maximum capacity to transport oxygen to tissues (VO_2max); percentage of maximum oxygen transport capacity that may be maintained without accumulation of lactate; greatest weight that can be lifted once; maximum power; maximum number of sit-ups performed without rest; maximum number of push-ups performed without rest; maximum number of crunches performed without rest; and local muscle endurance; and the first computer means generates enquiries relayed to the sports person which require data matching the measurements stored for the idealized physiological profile. It would have been obvious to one of ordinary skill in the art at the time the invention was made to include the measurements, as disclosed by Blau et al., incorporated into Gordon et al./Petrus in order to formulate exercise regimens based on these measurements.

Response to Arguments

5. Applicant's arguments filed 4/10/2008 have been fully considered but they are not persuasive. On pages 14 & 15 of the Remarks, the applicant argues that Petrus does not teach using an idealized profile and that Petrus does teach making use of "a health profile for a person of the consumer's age and health history background" column 2 lines 22 & 23. This profile is for a normal healthy person of the user's age and health history and not for some other desired profile. However, the examiner disagrees because the abstract of Petrus clearly states "comparing the individual's health

information to an ideal health profile". Then the applicant states that this profile is "not for some other desired profile". The examiner is unsure to what point the applicant is trying to make here. What does this profile is "not for some other desired profile" constitute? Further the applicant argues that "the user cannot select what profile is used for comparison because the profile is established by fixed characteristics such as age, sex, physical activity, dietary habits, past medical history, and other items covered in a questionnaire" column 2 line 65 - column 3 line 2. Again, the examiner disagrees with the applicant because the present claims do not construe making a selection. However, Petrus teaches "standardized profiles ..." column 2 line 65 - column 3 line 2. With that being said, Petrus teaches more than one profile that is used in order to make the comparison. Furthermore, the applicant argues that Gordon does not disclose retrieving an "idealized physiological profile" for the relevant sport or sports. Again these claims currently do not construe "retrieving" and Gordon was not relied upon by the examiner for "an/the idealized physiological profile". See rejection above. However, Gordon does disclose comparing the users performance at each measurement session to the norms (paragraphs 0021 & 0053) and generating a personalized exercise plan (customized exercise program) and Petrus teaches for example, "if the subject is underweight or overweight a recommended weight management program can be provided with the profile" column 3 lines 21-23 and more specifically "generating a computer-implemented dietary supplement profile" claim 1, but the entire claim is highly relevant. Therefore, with the differences highlighted by the applicant, the combination of Gordon and Petrus teaches generating a personalized exercise plan. On page 15 of

the Remarks, the applicant argues that nothing in Petrus and nothing in Gordon in view of Petrus teaches, suggests, or motivates that Applicant's unique invention of "varying the pre-programmed physiological profile" and "comparing the physiological input by each sports person with the varied physiological profile selected by the sports person … to formulate a training regime". In regards to the first argument, the applicant argues intended use. "Vary the pre-programmed physiological profile", is a recitation of the intended use of the claimed invention and it must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. Based on that analysis, Gordon discloses that limitation. In regards to the second portion of the argument, the analysis and rejection used above by the examiner clearly shows that the combination of Gorden and Petrus teaches comparing the physiological input by each sports person with the varied physiological profile selected by the sports person … to formulate a training regime" and to prevent from being redundant the examiner will not recite the analysis again. Lastly, it appears to the examiner that the applicant is using a piecemeal analysis of references on the claims. The applicant is attacking the references as individuals and not as a combination.

Citation of Pertinent Prior Art

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Summerell et al. (U.S. Patent Number 5,937,387) teaches a system and method for developing and selecting a customized wellness plan.

Douglas et al. (U.S. Patent Number 6,039,688) teaches therapeutic behavior modification program, compliance monitoring and feedback system.

Luciano (U.S. Patent Number 6,063,028) teaches an automated treatment selection method.

Conclusion

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KESHA FRISBY whose telephone number is (571)272-8774. The examiner can normally be reached on Monday-Friday 8am-4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Xuan Thai can be reached on 571-272-7147. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/K. F./
Examiner, Art Unit 3714

/XUAN M. THAI/
Supervisory Patent Examiner, Art Unit 3714